

No. 44117-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Shelly Fairman,**

Appellant.

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Cowlitz County Superior Court Cause No. 12-1-00513-1

The Honorable Judge Marilyn Haan

**Appellant's Opening Brief**

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Appellant

**BACKLUND & MISTRY**  
P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

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### **ASSIGNMENTS OF ERROR**

1. Ms. Fairman's conviction for possession with intent to deliver was entered in violation of her right to due process and her right to a jury trial.
2. The trial court erred by giving Instruction No. 13.
3. Instruction No. 13 unconstitutionally shifted the burden of proof.
4. Instruction No. 13 failed to make manifestly clear the state's burden to prove Ms. Fairman's knowledge.
5. If the instructional error is not preserved, Ms. Fairman was denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel.
6. Ms. Fairman was denied the effective assistance of counsel when her attorney failed to object to the court's erroneous instruction on the burden of proving knowledge.
7. Ms. Fairman was denied the effective assistance of counsel when her attorney argued in favor of the court's erroneous instruction on the burden of proving knowledge.
8. Ms. Fairman was denied the effective assistance of counsel when her attorney failed to propose an instruction clarifying that the unwitting possession defense applied only to the charge of simple possession.
9. The prosecutor committed prejudicial misconduct that violated Ms. Fairman's Fourteenth Amendment right to due process.
10. The prosecutor inappropriately urged jurors to convict based on improper factors.
11. The prosecutor improperly expressed a personal opinion in his closing arguments, in violation of Ms. Fairman's right to due process.
12. The prosecutor improperly "testified" in violation of Ms. Fairman's right to a jury trial and her right to a decision based solely on the evidence.

13. Defense counsel was ineffective for failing to object to prosecutorial misconduct in closing argument.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. To obtain a conviction for possession with intent to deliver, the state was required to prove that Ms. Fairman possessed the substance with the intent to deliver it, which necessarily includes proof of knowing possession. The court erroneously instructed jurors that Ms. Fairman bore the burden of proving lack of knowledge by a preponderance of the evidence, without clarifying that the instruction did not apply to the possession with intent charge. Was Ms. Fairman's conviction entered in violation of her right to due process and her jury trial right?
2. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, counsel failed to object to the court's erroneous instruction shifting the burden of proof on the issue of Ms. Fairman's mental state. If the instructional error is not preserved for review, was Ms. Fairman denied her right to the effective assistance of counsel?
3. Invited error does not preclude appellate review of an ineffective assistance claim. In this case, defense counsel argued in favor of the unwitting possession instruction, and failed to propose an instruction clarifying that it applied only to the simple possession charge. Did defense counsel's errors deprive Ms. Fairman of the effective assistance of counsel?
4. A prosecutor may not express a personal opinion or "testify" to facts not in evidence. Here, the prosecutor "testified" to facts not in evidence and expressed a personal opinion about the evidence. Did the prosecutor commit reversible misconduct that was flagrant and ill-intentioned, in violation of Mr. Phelps's state and federal constitutional rights to a jury trial and to due process?

5. To be effective, a defense attorney should make appropriate objections to prosecutorial misconduct; the objections may be made at sidebar or after the jury has left the room. Here, counsel failed to object to prejudicial misconduct. Was Ms. Fairman denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel?



## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Shelly Fairman's niece Sarai Jones was a methamphetamine user. RP 191, 214. Ms. Fairman knew that her niece was having difficulties, but was not aware of the extent of the drug use. RP 191, 283.

Ms. Fairman and Jones went to a Goodwill store together. RP 188-189. Jones assumed that Ms. Fairman would leave her purse in the car. While they drove to the store Jones put some items into the purse. RP 190-194, 207. She made no comment to Ms. Fairman as she did this. RP 190.

The items included methamphetamine, a pipe, a scale, and marijuana. RP 84, 116-117, 190-194, 198-201. When the two were arrested for shoplifting inside the Goodwill, Ms. Fairman had her purse with her. RP 67-68, 108. Both women were taken to the jail, and a corrections officer searched and itemized their property. RP 82-84, 110-111. Inside Ms. Fairman's purse were three small baggies of methamphetamine (inside a glasses case), and a pink makeup bag containing the scale, pipes and marijuana. RP 84, 112-118.

The state charged Ms. Fairman with two charges relating to the methamphetamine: possession with intent to deliver (count one) and

simple possession (count two).<sup>1</sup> The prosecution also charged possession of marijuana and theft in the third degree.<sup>2</sup> CP 2.

At trial, Jones testified that the controlled substances and related items were hers. RP 190-194, 198-201. She told the jury that she was well aware that her testimony could result in multiple charges, jail time, and problems with employment and housing. RP 196, 202. The prosecutor challenged her version of events during cross-examination, but did not question her about her familial relationship with Ms. Fairman. RP 204-216. Jones consistently denied the prosecutor's insinuation that she'd concocted a story with Ms. Fairman. RP 210-214.

The arresting officer acknowledged that none of the seized items were tested for fingerprints or DNA. RP 100-102. The jail staff who searched the purse described Ms. Fairman as anxious and jittery during the booking process. RP 113.

The state proposed an unwitting possession instruction.<sup>3</sup> RP 223-224; State's Proposed Instructions, Supp. CP. When it came time for the

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<sup>1</sup> Ms. Fairman was ultimately convicted of both charges; however, the court vacated the guilty verdict on the simple possession charge.

<sup>2</sup> Ms. Fairman pled guilty to the theft charge before trial. RP 13-14; CP 4.

<sup>3</sup> It appears from the docket that the defense attorney did not propose any jury instructions.

parties to take exception to the court's instructions, the prosecutor objected to the unwitting possession instruction (even though he himself had proposed it). Defense counsel argued in favor of the instruction. RP 221-224. The court gave the instruction, which read as follows:

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in her possession or did not know the nature of the substance. The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly, Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably than not true.  
Instruction No. 13, Court's Instructions, Supp. CP.

The prosecutor's first statement to the jury for his closing argument was: "Thank you, Your Honor. So we don't really have to prove much of anything." RP 229. He went on to refer to Jones as Ms. Fairman's "so-called niece" more than once, and said "[A]nd I'll guarantee you after three months there's certainly a conversation between the two of them that could say, hey, take a look at this evidence..." RP 229, 231, 233, 260. Defense counsel did not object to any of these comments. RP 229, 231, 233, 260.

The jury convicted Ms. Fairman of all charges.<sup>4</sup> RP 272-274. She timely appealed. CP 19.

## **ARGUMENT**

### **I. THE COURT’S INSTRUCTIONS REQUIRED MS. FAIRMAN TO DISPROVE AN ELEMENT OF THE OFFENSE, VIOLATING HER RIGHTS TO DUE PROCESS AND TRIAL BY JURY.**

#### **A. Standard of review.**

Constitutional errors are reviewed *de novo*. *McDevitt v. Harborview Med. Ctr.*, \_\_\_ Wn.2d \_\_\_, \_\_\_, 291 P.3d 876 (2012). A challenged jury instruction is reviewed *de novo* in the context of the instructions as a whole. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

A jury instruction that relieves the state of its burden to prove each element of an offense beyond a reasonable doubt is manifest constitutional error and can be raised for the first time on appeal. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 17 (2009); RAP 2.5(a)(3)

#### **B. The court’s instructions did not clearly communicate the state’s burden of proof.**

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash.

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<sup>4</sup> The court vacated the conviction for simple possession.

const. art. I, § 3; *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 2082, 124 L.Ed.2d 182 (1993); *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Jury instructions must clearly communicate this burden to the jury. *Bennett*, 161 Wn.2d at 307 (citing to *Victor v. Nebraska*, 511 U.S. 1, 5-6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994)). Instructions that relieve the state of its burden violate the right to trial by jury. *Sullivan*, 508 U.S. at 280-81; *Bennett*, 161 Wn.2d at 307.

The court's instructions must accurately inform the jury of the relevant law and not be misleading. *State v. LeFaber*, 128 Wn.2d 896, 903, 913 P.2d 369 (1996). Instructions that "allow the jury to apply an incorrect standard" require reversal. *Kyllo*, 166 Wn.2d at 864-65. Even if the jury more likely than not understood the state's burden of proof, a reviewing court must reverse if it "cannot be sure that it did." *State v. Smith*, 29832-9-III, 2013 WL 1456391, Slip Op. at 5 (Wash. Ct. App. Apr. 9, 2013).

In this case, the court's instructions permitted the jury to convict unless Ms. Fairman disproved her intent to deliver. The instructions were misleading and did not accurately inform the jury of the relevant law, requiring reversal of her conviction.

- C. By requiring Ms. Fairman to disprove her mental state, the court relieved the state of its burden to prove each element of possession with intent to deliver.

The affirmative defense of unwitting possession applies only to simple possession charges. *State v. Bradshaw*, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004). Unwitting possession was judicially created to “ameliorate[] the harshness of the almost strict criminal liability our law imposes for unauthorized possession of a controlled substance.” *State v. Cleppe*, 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981) (refusing to imply a *mens rea* element into the simple possession statute); *see also Bradshaw*, 152 Wn.2d at 537.

Once the state establishes possession, the accused person must prove unwitting possession by a preponderance of the evidence. *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994).

Ms. Fairman, however, was charged with both simple possession and possession with intent to deliver. CP 1-2. In her case, the state was required to prove beyond a reasonable doubt that she had the intent to deliver a controlled substance. *State v. Sims*, 119 Wn.2d 138, 141, 829 P.2d 1075 (1992). This necessarily included her knowledge of the nature of the substance and the fact of her own possession. Taking the jury instructions as a whole, the relevant legal standard was not “manifestly apparent to the average juror.” *Kyllo*, 166 Wn.2d at 864. This is so for two reasons.

First, the court offered no instruction clarifying that the defense of unwitting possession applied only to the simple possession charge. This left jurors free to assume that the defense applied to the possession with intent charge.

Second, the order in which the instructions were given exacerbated the risk that the jury would misunderstand the burden of proof. Following the standard preliminary instructions the court outlined the elements of possession with intent to deliver and the definitions of delivery, possession, and intent. Jury Instructions 9-12, Supp. CP. The court then instructed the jury regarding Ms. Fairman's burden of establishing unwitting possession by a preponderance of the evidence *before* turning to the elements and relevant definitions for simple possession. Jury Instruction 13, Supp. CP.

In context, the unwitting possession instruction appears to apply to possession with intent, rather than to simple possession. Because the instruction requiring Ms. Fairman to disprove her culpable mental state followed the definition of intent, a reasonable juror could have believed that Ms. Fairman bore the burden of establishing that she did not know the drugs were there, and thus did not have the intent to deliver a controlled substance.

The denial of the right to trial by jury is a structural error not subject to harmless error analysis. *Sullivan*, 508 U.S. at 279. Because the court's instructions relieved the state of its burden and deprived Ms. Fairman of her right to a jury trial, her conviction must be reversed and the case remanded for a new trial.

**II. IF THE INSTRUCTIONAL ERROR IS NOT PRESERVED FOR REVIEW, THEN TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.**

**A. Standard of review**

An ineffective assistance of counsel claim is of constitutional magnitude. It is reviewed *de novo* and may be raised for the first time on appeal. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

**B. Trial counsel's performance was deficient.**

To establish ineffective assistance of counsel, Ms. Fairman must demonstrate that counsel's performance was deficient and that she was prejudiced by that deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Kyllo*, 166 Wn.2d at 862. Performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." *Kyllo*, 166 Wn.2d at 862. In the absence of a tactical reason for doing so, failure to object to an erroneous jury instruction constitutes deficient



performance. *State v. Townsend*, 142 Wn.2d 838, 847, 15 P.3d 145 (2001).

In Ms. Fairman's case, defense counsel had no legitimate tactical reason for shifting the burden of proof away from the state and onto his client. *Kyllo* 166 Wn.2d at 869 (citing *State v. Woods*, 138 Wn. App. 191, 201-02, 156 P.3d 309 (2007) (no strategic or tactical reason for defense counsel to ease the state's burden of proof)). Counsel also failed to propose a jury instruction clarifying that the affirmative defense applied only to the simple possession charges.

Accordingly, defense counsel's performance was deficient.<sup>5</sup>

*Woods*, at 138 Wn. App. 191, 201-02.

C. Ms. Fairman was prejudiced by her attorney's deficient performance.

A party claiming ineffective assistance must demonstrate "a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862 (citing *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982

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<sup>5</sup> The unwitting possession instruction was proposed by the prosecutor; however, the state objected to the instruction and defense counsel argued for its inclusion. RP 221-224. If defense counsel is found to have affirmatively invited the error, he provided ineffective assistance of counsel. *Kyllo*, 166 Wn.2d at 861. The invited error doctrine does not preclude review of a defective jury instruction proposed by appellant's counsel if the error was the result of ineffective assistance of counsel. *Id.*

(1988)). Washington courts have acknowledged the difficulty of assessing the effect of a jury instruction that impermissibly shifts the burden of proof. *Smith*, Slip Op. at 5-6.

Ms. Fairman's defense rested on the lack of proof regarding her mental state. Despite this, defense counsel failed to object to the unwitting possession instruction as proposed. Jurors could have understood the instruction to require Ms. Fairman to prove lack of knowledge, instead of requiring the state to prove her knowledge as part of its proof of her intent.

There is a reasonable probability that the outcome of this trial would have been different absent her counsel's deficient performance. *Kyllo*, 166 Wn.2d at 862. Accordingly, her conviction must be reversed and the case remanded for a new trial. *Id.*

### **III. THE PROSECUTOR COMMITTED MISCONDUCT BY MISSTATING THE STATE'S BURDEN OF PROOF AND EXPRESSING PERSONAL OPINIONS.**

#### **A. Standard of review**

Prosecutorial misconduct requires reversal if there is a "substantial likelihood the misconduct affected the jury verdict." *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (citing *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011)). The lack of a defense objection at trial does not preclude review if the misconduct was "flagrant and ill-intentioned." *Id.* Furthermore, misconduct may be raised for the first time

on review if it is manifest error affecting a constitutional right. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); RAP 2.5(a)(3).

A prosecutor's comments during closing argument are reviewed in the context of the case as a whole. *Glasmann*, 175 Wn.2d at 704.

B. The prosecutor committed misconduct by misstating the state's burden of proof.

Prosecutorial misconduct can deprive an accused person of the right to a fair trial. *Glasmann*, 175 Wn.2d at 703-704 (citing *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)); U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. const. art. I, § 22.

A prosecutor is a "quasi-judicial officer" with a duty to ensure that the accused receives a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). It is misconduct for a prosecutor to argue that the burden of proof lies with the accused or to undermine the presumption of innocence. *State v. Emery*, 174 Wn.2d 741, 759, 278 P.3d 653 (2012); *State v. Thorgerson*, 172 Wn.2d at 453.

The first sentence of the prosecutor's closing argument was "we don't really have to prove much of anything." RP 229. This statement was flagrant and ill-intentioned misconduct and there is a substantial likelihood that it affected the jury's verdict. *Glasmann*, 175 Wn.2d at 712

(statements during closing that shift the burden of proof to the accused constitute flagrant and ill-intentioned misconduct).

The improper statement was made shortly after jurors heard the judge read an instruction shifting the burden of proof to Ms. Fairman on the issue of her mental state. This compounded the effect of the prosecutor's misconduct.

Furthermore, the state presented no direct evidence establishing Ms. Fairman's knowledge. The prosecution's circumstantial evidence of knowledge was slim, and consisted of Ms. Fairman's ownership of the purse and her nervousness when she was booked at the jail. RP 113. By contrast, the testimony showing her *lack* of knowledge (and lack of intent to deliver) was direct and strong: Jones's confession that she'd slipped the drugs and other items into the purse was clearly against her own interests. RP 190-202. Under these circumstances, the prosecutor should not have chosen to start his argument by claiming that his burden was low.

The prosecutor's flagrant and ill-intentioned misconduct requires reversal. *Glasmann*, 175 Wn.2d at 712. The case must be remanded for a new trial. *Id.*

- C. The prosecutor committed misconduct by expressing personal opinions regarding the evidence and witness credibility.

The determination of whether a witness has testified truthfully is entirely within the province of the jury. *Thorgerson*, 172 Wn.2d at 443. Though a prosecutor is permitted to argue reasonable inferences from the evidence, he or she may not make prejudicial statements that are not supported by the evidence. *Weber*, 159 Wn.2d at 276 (citing to *State v. Rose*, 62 Wn.2d 309, 312, 382 P.2d 513 (1963)). Likewise, it is misconduct for a prosecutor to state personal beliefs about a witness's credibility or the guilt of the accused. *Glasmann*, 1875 Wn.2d at 706-07; *Dhaliwal*, 150 Wn.2d at 577-78.

Here, the prosecutor “guaranteed” that Ms. Fairman had colluded with Jones to fabricate a story. RP 223. This was a clear expression of personal opinion.

The prosecutor also referred to Jones as Ms. Fairman’s “so-called niece.” RP 231. Like the “guarantee” argument, this statement also improperly conveyed a personal opinion regarding witness credibility. No evidence undermined Jones’s testimony that she was Ms. Fairman’s niece. RP 204-216. Despite this, the counsel for the state implied he had additional information to that effect. Rather than focusing on the real issues of credibility raised at trial, the prosecutor injected his personal skepticism into the proceedings.

This case was a pure credibility contest. The state's only evidence that Ms. Fairman knew she possessed a controlled substance came from the jail officer's claim that she appeared nervous while being booked into jail. RP 229-231, 234, 265. This circumstantial evidence provided slim proof, even when combined with Ms. Fairman's ownership of the purse. By contrast Jones's testimony that Ms. Fairman knew nothing of the drugs in her purse established a complete defense, but only if it was sufficiently credible to raise a reasonable doubt.

Given this background, there is a substantial likelihood that the prosecutor's improper statements affected the outcome of Ms. Fairman's trial. *Boehning*, 127 Wn. App. at 523 (noting that prosecutorial misconduct is more likely to affect the outcome when the case relies almost entirely upon the credibility of the witnesses). The prosecutor's statements implying he had additional evidence undermining Jones's credibility was flagrant and ill-intentioned misconduct. *State v. Jones*, 144 Wn. App. 284, 183 P.3d 307 (2008).

Accordingly, Ms. Fairman's conviction must be reversed and the case remanded for a new trial. *Glasmann*, 1875 Wn.2d at 706-07.

- D. If the issue is not preserved for review, Ms. Fairman was denied the effective assistance of counsel by his attorney's failure to object.

Failure to object to improper closing arguments is objectively unreasonable under most circumstances:

At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

*Hodge v. Hurley*, 426 F.3d 368, 386 (6<sup>th</sup> Cir., 2005).

In Ms. Fairman's case, defense counsel should have objected to the prosecutor's flagrant and ill-intentioned misconduct. The prohibition against stating a personal opinion or otherwise vouching for evidence is well established. By failing to object, counsel's performance fell below an objective standard of reasonableness. At a minimum, the lawyer should have either requested a sidebar or lodged an objection when the jury left the courtroom. *Id.*

Counsel should also have objected when the prosecutor urged jurors to focus on intuition rather than probative evidence and sound reason. *Glasmann*, 1875 Wn.2d at 704. The prosecutor's egregious misconduct unfairly threw "the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused." *State v. Monday*, 171 Wn.2d 667,

677, 257 P.3d 551 (2011) (quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)). It also undermined the jurors' ability to decide Ms. Fairman's fate based solely on the evidence. *Glasmann*, 1875 Wn.2d at 706.

Ms. Fairman was prejudiced by the error. The prosecutor's improper comments substantially increased the likelihood that jurors would vote guilty based on improper factors. *See Glasmann*, 1875 Wn.2d at 704. The failure to object deprived Ms. Fairman of her Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Hurley*, 426 F.3d 368 at 386. Accordingly, her convictions must be reversed and the case remanded for a new trial. *Id.*

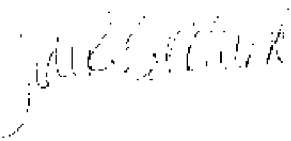


### **CONCLUSION**

For the foregoing reasons, Ms. Fairman's convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on April 18, 2013,

### **BACKLUND AND MISTRY**



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant



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Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Shelly Fairman, DOC #711102  
Washington Corrections Center for Women  
9601 Bujacich Rd. NW  
Gig Harbor, WA 98332

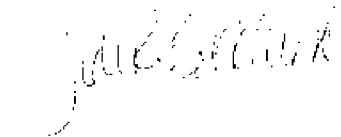
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney  
baurs@co.cowlitz.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 18, 2013.



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

# BACKLUND & MISTRY

## April 18, 2013 - 4:28 PM

### Transmittal Letter

Document Uploaded: 441179-Appellant's Brief.pdf

Case Name: State v. Shelly Fairman

Court of Appeals Case Number: 44117-9

**Is this a Personal Restraint Petition?** Yes ☐ No ☒

#### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

☒ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_

#### Comments:

No Comments were entered.

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baurs@co.cowlitz.wa.us